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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943.

No. 697

IN THE MATTER OF

CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Debtor.

CLAUDE A. ROTH, TRUSTEE, CHICAGO AND NORTH WESTERN RAILWAY COMPANY,

Petitioner,

vs.

LILLIAN CARLSON, AS ADMINISTRATRIX, ETC., OF THE ESTATE OF CHARLES A. ANDERSON, DECEASED,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner, Claude A. Roth, trustee of the property of Chicago and North Western Railway Company, files this petition to review the judgment of the United States Circuit Court of Appeals for the Seventh Circuit

entered in this cause on November 15, 1943. (R. 115) Rehearing was denied on December 11, 1943. (R. 116)*

SUMMARY STATEMENT OF THE MATTER INVOLVED.

On June 2, 1941, Lillian Carlson, as administratrix of the estate of Charles A. Anderson, deceased, by presumption of law, filed her late claim, pursuant to leave of court in the Chicago and North Western Railway Company reorganization proceedings pending in the United States District Court for the Northern District of Illinois, Eastern Division. (R. 2)

Charles A. Anderson was employed by the Chicago and North Western Railway Company from 1885 until October 1, 1930 (R. 6-7) at which time he was placed on the pension rolls of the company. (R. 6) On December 21, 1932 he disappeared and has not been seen nor heard from since. Payment of the pension stopped when he disappeared. The claimant is asking that she, as the representative of Anderson's estate, be awarded the pension which she alleges would have been paid to him from the date of his disappearance until the end of seven years. (R. 3-4-5) According to the law of Illinois, Anderson was presumed dead at the end of seven years after he disappeared. As Anderson was receiving a pension of $34.16 a month the claim totals $2,856.00. (R. 68-71)

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* Petitioner is successor trustee to Charles M. Thomson, deceased. On February 2, 1944, the Circuit Court of Appeals entered an order providing that your petitioner be substituted as party appellee. (R. 127)

The District Court referred the claim to a Special Master who (R. 2-3), after hearing testimony and receiving evidence, filed his opinion (R. 3-67), findings of fact and conclusions of law. (R. 67-72) It was his recommendation that the claim should be allowed in full as a general claim (R. 71-72), because he considered the law of Illinois to be that during the seven years after one has disappeared he is presumed to be alive. (R. 70)

To the Special Master's report the Trustee filed exceptions. (R. 72-75) The District Court heard arguments on the exceptions and sustained one of them, holding that it was not necessary to consider the others. It was the District Court's opinion that the claimant had failed to establish that Anderson was alive during all or any part of the seven-year period and that she had the burden of proof in that connection.* (R. 93) The claim was disallowed. (R. 92-93)

The claimant then filed an appeal to the United States Circuit Court of Appeals (R. 94-95) and on November

* The exception sustained reads as follows:
"6. What purports to be the sixth finding of fact is in reality two conclusions of law, both of which are erroneous. The Master erred in finding that, according to the law of the State of Illinois, Charles A. Anderson died by presumption of law on December 20, 1939, said day being the last day of the seven-year period during which, according to the applicable law of the State of Illinois, life continued. The Master should have found that the burden was upon the claimant to prove that Charles A. Anderson was alive during all or part of the seven-year period and that this the claimant failed to do. The Master likewise erred in finding that, according to Illinois law, the expectation of life of Charles A. Anderson was 7.55 years at the time of his disappearance." (R. 74)

15, 1943 the Circuit Court of Appeals entered a decree setting aside the order of the United States District Court disallowing the claim and remanding the cause for further action by that court. (R. 115) The Circuit Court of Appeals believed that the conclusion of the Master was a finding of fact and under Rule 53(e)(2) of the Rules of Civil Procedure* the District Court could not set aside this finding unless "clearly erroneous." The Circuit Court said that the finding was not "clearly erroneous."

Charles A. Anderson, at the time he disappeared, was 72 years old. (R. 68) On December 18, 1932 Anderson boarded a train of the Chicago and North Western Railway for a trip to Los Angeles, California, to visit a daughter. (R. 68) While the train was en route he left it at several stations, each time telling the porter on the car that was where he got off. The porter told him on those occasions that he had not yet arrived at his destination, whereupon Anderson would get back on the train. (R. 9)

At Yermo, California, a desert town of 400 population located in San Bernardino County, close by the foot-

*"In Non-Jury Actions. In an action to be tried without a jury the court shall accept the master's findings of fact unless clearly erroneous. Within 10 days after being served with notice of the filing of the report any party may serve written objections thereto upon the other parties. Application to the court for action upon the report and upon objections thereto shall be by motion and upon notice as prescribed in Rule 6(d). The court after hearing may adopt the report or may modify it or may reject it in whole or in part or may receive further evidence or may recommit it with instructions." (Rule 53(e)(2) of the Rules of Civil Procedure for District Courts of the United States)

hills of the Calico Mountains and surrounded by vast untraveled stretches of desert country (R. 70), Anderson, on December 21, 1932, again left the train saying to the porter: "This is where I get off. This is a short cut. I get off here." (R. 9) The porter put him back on the train a few minutes before it was due to leave but Anderson left the train again and it departed without him. (R. 9) At Yermo, Anderson, without overcoat or bag (R. 10), was seen by several people. An employee of the railroad saw him leave the train. (R. 10) He talked to the Station Agent, telling him he was going to see a daughter residing in Yermo, although he had no daughter living there. (R. 10) He then went to a butcher shop in the town and ordered sliced sausage, but before he could be served he left the shop. (R. 10) He was not seen again. The temperature in the vicinity for the month of December, 1932, varied between 32.4° and 63.5° and the precipitation was substantially above normal. (R. 70) It was rumored that Anderson was seen in Las Vegas, Nevada, on December 25, 1932, but the report was never confirmed (R. 12) and the Special Master found as a fact that he has never been seen since December 21, 1932. (R. 69-70)

At the time he disappeared he had on his person papers which would have identified him. (R. 12) His disappearance from that date on was complete. He was not seen and he did not communicate with his family. (R. 69-70) He has not been heard from since that time by his friends, relatives, or those most likely or naturally to have heard from him if he had been alive. (R. 69-70)

OPINION BELOW

The Circuit Court of Appeals' opinion of November 15, 1943 (rehearing denied December 11, 1943) has ~~not yet~~ been reported. It appears in the Record transmitted herewith at pages 110-114. at 138 Fed 2d 753

JURISDICTION.

The judgment of the Circuit Court of Appeals here sought to be reviewed, entered on November 15, 1943, became final on December 11, 1943, when the petition for rehearing was denied. (R. 116) The jurisdiction of this court is invoked under Section 240(a) of the Judicial Code amended by the Act of February 13, 1925 (28 U. S. C. A. Sec. 347 (a)).

QUESTIONS PRESENTED.

1. Did the Circuit Court of Appeals, in sustaining the Special Master's presumption that Anderson was alive during the seven years following his disappearance, apply the law of the State of Illinois, in conformity with the rule laid down in *Erie Railroad Company* v. *Tompkins,* 304 U. S. 64?

2. Did the Circuit Court of Appeals depart from Illinois law in sustaining the Special Master's requirement that the Trustee must prove the fact of Anderson's death during the seven-year period to overcome a presumption of life?

3. Did the Circuit Court of Appeals misconceive and confuse the purpose of Rule 53(e) (2) of the Federal Rules of Civil Procedure by not allowing the District Judge to substitute his inferences for the Special Master's inferences?

4. Did Rule 53(e) (2) change the law that a District Court is not bound by inferences drawn by a Master from undisputed facts?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

The Circuit Court of Appeals, in its opinion which is here sought to be reviewed, has decided important questions of Illinois law in conflict with applicable Illinois decisions.

In addition, by its holding with respect to Rule 53(e) (2) of the Federal Rules of Civil Procedure, it has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this court's power of supervision.

I.

The Circuit Court erred in holding the Master's finding that Anderson continued to be alive for seven years was a finding of fact.

(a) Under the Illinois law the questions of life and death after an unexplained disappearance are entirely matters of presumption.

(b) The Master's opinion that Anderson continued alive could only be a conclusion of law.

II.

The Circuit Court of Appeals erred by holding, in effect, that the District Court was bound under Rule 53 (e) (2) to accept conclusions, inferences and presumptions of the Special Master.

(a) It has been held uniformly that district judges may draw their own conclusions, inferences and presumptions from uncontroverted facts.

(b) Though the court held otherwise in this case, it is the accepted and usual course of proceedings to hold that Rule 53(e)(2) has no binding force on a judge when he is considering conclusions, inferences and presumptions of a special master.

PRAYER FOR RELIEF.

WHEREFORE this petitioner respectfully prays that a writ of certiorari issue out of and under the seal of this Honorable Court directed to the Circuit Court of Appeals for the Seventh Circuit to certify the record to the end that the decree of that court, entered on November 15, 1943 (rehearing denied December 11, 1943) be reversed, with directions to affirm the decree of the District Court in this case.

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